



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

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MICHAEL J. SULLIVAN
DIRECTOR

December 8, 1995
AO-95-40

Diane Rubin, Esq.
Goldstein & Manello, P.C.
265 Franklin Street
Boston, MA 02110-3192

Re: Senator Henri Rauschenbach

Dear Ms. Rubin:

This letter is in response to your October 31, 1995 request for an advisory opinion regarding whether Senator Rauschenbach's political committee may pay for certain legal expenses incurred by the Senator in responding to an investigation by the State Ethics Commission and defending a criminal prosecution arising from that investigation, which resulted in the acquittal of the Senator.

Question:

May the Senator's political committee make expenditures to pay for legal expenses incurred by the Senator in connection with the Ethics Commission investigation and in defending against criminal charges brought under the Massachusetts conflict of interest law where the Senator has obtained an acquittal?

Answer:

Yes.

Facts:

You state that in 1992 the State Ethics Commission initiated an investigation into certain of the Senator's activities, including the Senator's chairmanship of Treasurer-Elect Joseph Malone's transition committee on pensions and the Senator's efforts to arrange meetings with the Treasurer's Office relating to a certain pension and benefits processing product. Following the investigation by the Ethics Commission, the Attorney General started criminal proceedings against the Senator in 1993, alleging a violation of M.G.L. c. 268A, the conflict of interest law. A Suffolk County jury recently returned a verdict of not guilty on all counts.

You have also stated that the investigation and prosecution of the conflict of interest charges have had a substantial impact on the Senator's standing before the public in general

and before his constituents on Cape Cod and the Islands in particular. Articles about both of the proceedings were featured regularly and prominently from 1991 through 1995 in The Boston Globe, The Boston Herald, Boston Magazine, The Boston Phoenix and The Cape Cod Times, the latter being a daily newspaper serving the Senator's district. The proceedings also received extensive broadcast coverage from statewide and local television and radio stations.

Finally, you have indicated that it has been the Senator's belief, from the start of the proceedings, that all of the charges against him were without merit and that it was critical to the Senator's political career and the integrity of the office he held that he vigorously defend himself against the allegations. This belief was confirmed during the Senator's 1994 reelection campaign, when the Senator's opponent in the primary called the Senator's integrity into question. Accordingly, the Senator retained attorneys to represent him before the State Ethics Commission and to defend the criminal charges in Suffolk Superior Court.

Discussion:

A. Expenditures relating to Ethics Commission investigation.

Section 6 of M.G.L. c. 55, the campaign finance law, states that a candidate's political committee may make expenditures only "for the enhancement of the political future of the candidate . . . so long as such expenditure is not primarily for the candidate's or any other person's personal use"

Regulations issued by this office pursuant to section 6 prohibit expenditures which "acknowledge any guilt as to the violation of any law." See 970 CMR 2.06(a)(1). In addition, the regulations prohibit "expenses relative to alleged violations of law, other than those which have arisen solely as a function of an individual assuming and performing necessary duties and responsibilities as a candidate or treasurer of a political committee. . . ." See 970 CMR 2.06(a)(2). Payment of expenses relating to civil suits or administrative proceedings, such as an Ethics Commission investigation, is also prohibited, with certain exceptions. Specifically, 970 CMR 2.06(6)(a)(3)(c) exempts "expenses relative to necessary legal action to protect or further the interests of the political committee."

This office has stated that several factors¹ must be considered in determining whether campaign funds can be used to pay for legal expenses relating to an administrative proceeding:

¹ The ultimate resolution of an investigation is not a factor in our determinations: if an expenditure is made to enhance a candidate's political future, such expenditure, provided it does not acknowledge any guilt as to the violation of any law, is appropriate regardless of whether or not the candidate is exonerated.

1. whether a complaint was filed with the State Ethics Commission;
2. whether significant publicity through print or broadcast media has resulted;
3. whether the candidate's future campaigns would likely be negatively affected by the publicity.

See AO-94-25, AO-92-18, and AO-91-08. Where each of the factors is present, as in this instance, expenditures can be considered "necessary" and designed "to protect or further the interests of the political committee," and therefore in compliance with 970 C.M.R. 2.06(6)(a)(3)(c).

This office has previously advised that a candidate's committee may generally make such expenditures in connection with State Ethics Commission investigations, even where such investigations relate to the performance of a candidate's responsibilities as a public official. As we noted in AO-94-25:

Clearly, the fundamental issues of integrity and reputation are immediately called into question by a Commission investigation. The elected official usually must respond to such issues in the public forum while also responding to the specific requests of the Commission. A successful public response to the investigation, or equally, an unsuccessful response, would certainly have a significant impact on the election campaign of a candidate.

By calling into question the Senator's reputation and integrity, the Ethics Commission review was inextricably related to the Senator's political future and the Committee could properly make expenditures for legal services provided in connection with the investigation.

B. Expenditures relating to defense in criminal proceeding.

The more difficult question presented in this instance is whether campaign funds could be used to defend against a criminal action brought by the Attorney General after completion of an investigation by the Ethics Commission. The applicable section of the regulations, 970 CMR 2.06(6)(a)(2), prohibits:

Any expenses relative to alleged violations of law, other than those which have arisen solely as a function of an individual assuming and performing necessary duties and responsibilities as a candidate or treasurer of a political committee. However, under no circumstances may funds of a political committee be used for any such expenses incurred after conviction of the candidate or treasurer has occurred.

The regulations must be read in the context of section 6 of chapter 55, which prohibits the expenditure of campaign funds for any person's "personal use." Indeed, the 970 CMR 2.06(6) was designed to implement the prohibition. After the regulations were adopted, section 6 was amended by Section 379 of Chapter 133 of the Acts of 1992 to exclude, from the definition of "personal use" expenditures "relating to the provision of constituent or legislative services."

The amendment to section 6 recognizes that a candidate who is also an incumbent office holder may use campaign funds for matters which relate to official duties required of the office holder, but which also enhance the candidate's political future. Such official "duties and responsibilities" may be considered the duties not only of the office holder, but also of a candidate. Therefore, expenditures associated with the defense of a legal action based on an office holder's alleged conflict of interest while engaged in official duties would be consistent with the regulations, and with section 6.²

Therefore, paying the legal expenses associated with the defense of both the administrative or criminal actions relating to a candidate's alleged violation of the conflict of interest law would be consistent with section 6 of chapter 55: the purpose of such expenditures is to enhance the political future of the candidate and not primarily for the candidate's or any other person's personal use. Since the expenditures, in both instances, would comply with section 6 and the regulations, there should be no difference between the committee defraying the costs in either phase of the proceedings.³

For the reasons set forth above, expenditures by the Senator's political committee to pay for legal expenses arising from the State Ethics Commission investigation and the subsequent criminal prosecution would be permitted under the campaign finance law.

² In contrast, expenditures which are not related to a candidate's role as candidate or office holder would be considered primarily "personal." For example, campaign funds could not be used to pay the costs of a real estate closing on a candidate's residence, or the costs relating to a candidate's divorce proceeding, since such expenses are primarily "personal."

³ AO-85-13, which concluded that a candidate's committee could not make expenditures in connection with defending against indictments relating to alleged violation of the candidate's responsibilities as a public official, is overruled. Such expenditures are permissible if consistent with section 6 of chapter 55, and the regulations as interpreted in light of amendments to section 6, even if a candidate is ultimately convicted.

Diane Rubin, Esq.
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This opinion has been rendered solely on the basis of representations made in your letter and solely in the context of M.G.L. c. 55. Please do not hesitate to contact the office if you have any additional questions.

Sincerely,

A handwritten signature in cursive script, reading "Michael J. Sullivan". The signature is written in dark ink and is positioned above the printed name and title.

Michael J. Sullivan
Director

MJS/cp